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IN THE

Supreme Court of the United States

No. 75-1030

THEODORE WOROZBYT
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on August 27, 1975, and a Motion for Rehearing En Banc denied on October 20, 1975.

CITATIONS TO OPINIONS BELOW

The Opinion of the Court of Appeals is reproduced and attached to this Brief as "Appendix A."

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JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Where a person subpoenaed before a grand jury bases his refusal to testify on the ground that the questions to be put to him are the product of unlawful electronic surveillance, is an *in camera* examination of the underlying documents submitted in support of the application to conduct electronic surveillance sufficient compliance with *Gelbard* v. *United States,* 408 U.S. 41 (1972), or is the subpoenaed witness entitled to personally examine these underlying documents in an adversary atmosphere in the absence of a countervailing claim justifying secrecy before he may be committed for civil contempt under 28 U.S.C. Section 1826?

STATUTES INVOLVED

This case arose under 28 U.S.C. Section 1826 which provides:

> "Whenever a witness in any proceeding before . . . any . . . grand jury of the United States refuses without just cause shown to comply with an order of the court to testify . . . the court, upon such refusal . . . may summarily order his confinement . . . until such time as the witness is willing to give such testimony . . . No period of confinement shall exceed the life of—
>
> (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months."

STATEMENT OF THE CASE

The Petitioner was ordered to appear before a grand jury to testify relating to the affairs of one Irvin Berlin. He refused to testify on the ground that the inquiry was the result of an illegal wiretap. He maintained that he had a right to examine the underlying affidavits to see that, at the very least, they were facially valid.

The District Court for the Northern District of Georgia, Moye, J., rejected his contention. The Court made an *in camera* review and finding the documents facially valid sentenced him to jail for the life of the grand jury.

Appeal and Motion for Rehearing En Banc followed and the decision below was affirmed.

REASONS FOR GRANTING THE WRIT

I

There Is Conflict Among the Circuits

There is conflict among the Circuits as to whether or not a witness summoned before a grand jury is entitled to see the affidavits supporting the wiretap which resulted in his being subpoenaed.

The Second Circuit, in *In Re Persico*, 491 F. 2d 1156 (2d Cir. 1974), held that he was not, but that an *in camera* examination was sufficient.

The First Circuit, however, took the opposite view in *In Re Lochiatto*, 497 F. 2d 803 (1st Cir. 1974). The Court, while not granting a plenary hearing, did require that the witness be allowed to examine and challenge the facial validity of the documents.

II

If There Is No Reason for Secrecy, Then the Affidavits Should Be Disgorged

The Government, in a typically arrogant fashion, has refused to allow the Petitioner to see the underlying affidavits submitted in support of the wiretap application which led to his being subpoenaed. As a reason it has merely maintained that a witness subpoenaed before a grand jury is not entitled, in spite of *Gelbard, supra*, to see what led to his being hailed before the grand jury.

That is no reason at all.

Here the Petitioner did not seek a plenary hearing. All that he asked is that he be allowed to examine the underlying documents in order to see whether they were facially valid. This would have halted the grand jury proceedings for about ten minutes.

But the Court, agreeing with the Government, felt that an *in camera* examination was sufficient and that an adversary proceeding was unnecessary.

This Court should decide whether, in these circumstances, secrecy serves any legitimate governmental purpose; whether secrecy enhances the criminal justice system; whether, indeed, there was any justification for secrecy in this case.

Government secrecy should, in the absence of countervailing justification, have no santification by this or any other court. The sorry history of the role that government secrecy has played in our system shows that it is the refuge of scoundrels and malefactors. It has no place in a society that is free and wants to remain free.

CONCLUSION

It is clear that there is conflict among the Circuits on this issue. This conflict can be resolved only by this Court.

The rule of secrecy under which the government desires to operate should be stopped. It is only by having an open government that this nation can protect its basic freedoms.

Respectfully submitted,

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